A

EHQ PROJECTS SDN BHD & ORS

v.

EQUIPRO SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[CIVIL SUIT NO: D8-22-1520-2006]
12 MARCH 2012

C

CONTRACT: *Agreement - Loan - Loan void for illegality - Breach- Scheme devised by third defendant to secure loan from fourth defendant - Whether officers of fourth defendant colluded with third defendant - Whether plaintiffs aware of mechanism under which loan was obtained - Whether plaintiffs defrauded - Whether plaintiffs proved fraud committed beyond reasonable doubt - Whether fourth defendant liable for actions of its officers*

D

CIVIL PROCEDURE: *Declaration - Application for - Agreement - Application for agreement executed to be declared void for illegality - Scheme devised by third defendant to secure loan from fourth defendant - Whether officers of fourth defendant colluded with third defendant - Whether plaintiffs aware of mechanism under which loan was obtained - Whether plaintiffs defrauded - Whether plaintiffs proved fraud committed beyond reasonable doubt - Whether fourth defendant liable for actions of its officers*

E

F

The plaintiffs' claim herein was for a declaration that the Loan Agreement, Debenture, Deed of Assignment ('TE Proceeds') and Deed of Assignment ('STMB Proceeds') executed between the first defendant and the fourth defendant were void for illegality and that the first, second and third defendants, by way of restitution, pay a sum of RM1.5 million to the fourth defendant (Malaysian Industrial Development Finance Berhad). The fourth defendant contended that the first defendant was the borrower of a loan facility granted under the Fund for Small and Medium Industries 2 ("FSMI 2") and that the second and third plaintiffs were guarantors. It had counterclaimed for a sum of RM1,522,949.17, which was denied by the plaintiffs. The background facts showed that sometime in November/December 2005, the third defendant had approached the plaintiffs with a proposal to secure a loan from the fourth defendant for the first plaintiff to purchase sound and lighting equipment as the first plaintiff was facing some

G

H

I

difficulty in securing a loan from a banking institution. Under the scheme devised by the third defendant, the first plaintiff was to be the borrower of RM1.5 million from the fourth defendant, and the loan sum would be released to the first defendant to utilise the loan sum for the purchase of the equipment. The third plaintiff testified that he and the second plaintiff had a meeting with the fourth defendant's officers, one Nazerin Omar and one Mohd Rizal, to discuss the proposed loan. As such, it was the evidence of the third plaintiff that these officers of the fourth defendant had colluded with the third defendant as regards the scheme. In furtherance of the scheme, the quotations for the equipment were fabricated by the third defendant and sent to the fourth defendant. Subsequently, the documentations for the loan were executed and the loan sum of RM1.5 million was disbursed to the first defendant. However, the defendants failed to utilise the RM1.5 million to purchase equipment for the first plaintiff. The plaintiffs thus attempted to recover the monies so that the plaintiffs could purchase the equipment themselves. The third defendant had since absconded and attempts to locate him to secure a refund of the monies met with no success. In light of the breach committed by the first defendant, the plaintiffs contended that the first, second and third defendants ought to be compelled to return the RM1.5 million so that the same could be refunded to the fourth defendant. The fourth defendant's witness, DW1, however, argued that all the documents signed by the parties were legal and in accordance with procedure and would bind the plaintiffs with the fourth defendant. According to the fourth defendant's witness, DW2, after the disbursement of the loan amount to the first defendant, the first plaintiff had made one repayment, but only towards interest. It had not made any complaints to the fourth defendant. It was stressed by DW2 that if the first plaintiff had not received the goods, then it should not have signed the delivery order or given the letter of authorisation to disburse the loan proceeds to the first defendant. Thereafter, the plaintiffs had stopped payments of their instalments. The fourth defendant denied the plaintiffs' allegation of fraud and had then counterclaimed against the plaintiff.

A B C D E F G H I

Held (dismissing plaintiffs' claim against fourth defendant; dismissing fourth defendant's counterclaim against plaintiffs):

(1) The presence of the third defendant at the first meeting between the second and third plaintiffs and the officers of the fourth defendant was consistent with the plaintiffs' claim that it was the third defendant who had offered to secure the loan facility for them. The arrangement made between the parties was a mechanism for securing the loan. The plaintiffs were well aware that it was part of the arrangement worked by the third defendant that the goods would only be supplied by the first defendant after the disbursement of the loan to the first defendant. The first plaintiff would have to convince the fourth defendant that the goods had indeed been delivered and this was done by the second plaintiff acknowledging that the goods had indeed been delivered in good condition. (para 74)

(2) On the facts as adduced, where the plaintiffs were well aware of the arrangement or mechanism under which the loan was to be obtained and the proceeds of the loan disbursed to the first defendant, the plaintiffs could not be said to have been defrauded as regards the alleged "scheme" or mechanism. The plaintiffs were active parties to the arrangement and as such the issue of fraud being committed against them by the fourth defendant would not arise. Further, since the plaintiffs alleged fraud had been committed against them, it was incumbent upon them to establish this beyond reasonable doubt. This they failed to do. (paras 79 & 82)

(3) This court had carefully weighed the evidence of the third plaintiff about how the fictitious list of equipments and photographs were prepared. Based on the evidence of the third plaintiff, the role of the fourth defendant's officers would have been significant. The role of the third defendant and Mohd Rizal from the fourth defendant in taking photographs of the first plaintiff's old equipment and passing them off as new equipment as well as affixing stickers of the fourth defendant on some of the existing equipment of the first plaintiff to be passed off as the equipment that was supplied was very pertinent and spoke volumes of the involvement of the fourth defendant's officers. (para 84)

(4) The evidence adduced pointed irresistibly to the conclusion that the fourth defendant's officers were not only aware of the scheme, arrangement or mechanism for the disbursement of the loan to the first defendant without and before the actual purchase and delivery of the equipments by the first defendant to the first plaintiff but that they had taken an active part in bringing about the scheme, arrangement or mechanism into fruition. Thus, the fourth defendant was liable for the actions of its officers. (para 86)

(5) The plaintiffs failed to make out their case against the fourth defendant and as such the plaintiffs' claim against the fourth defendant was dismissed. The fourth defendant had also failed to make out its counterclaim against the plaintiffs on a balance of probabilities and as such, the fourth defendant's counterclaim was also dismissed. (para 90)

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Dato' Zamzuri Ghaffar v. BIMB Trust Ltd & Ors [2010] 1 LNS 925 HC ***(refd)***

Maslinda Ishak v. Mohd Tahir Osman & Ors [2009] 6 CLJ 653 CA ***(refd)***

Narayanan Chettiyar v. Official Assignee, Ranggoon [1941] PC 95 ***(refd)***

Yeo Tin Sang v. Lim Choo Kee [1960] 1 LNS 164 HC ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 17

For the plaintiffs - Walter Pereirra; M/s Kamarrudin & Partners

For the 4th defendant - Siti Sarah Mohd Yusoff; M/s Sidek Teoh Wong & Dennis

Reported by Suhainah Wahiduddin

JUDGMENT

Amelia Tee Abdullah J:

[1] Andrew Charles Warren ("the 2nd plaintiff") and Sanjay Neil a/l Ramasamy ("the 3rd plaintiff") are directors of EHQ Projects Sdn Bhd ("the 1st plaintiff"). Shah Amirudin bin Idris ("the 2nd defendant") is a director of Equipro Sdn Bhd ("the 1st defendant"). The 3rd defendant, Hishamuddin bin Malek, is a

director of Vitcom Sdn Bhd and a shadow director of the 1st defendant. The 4th defendant, Malaysian Industrial Development Finance Berhad, is a financial institution incorporated under the Companies Act 1965.

[2] The plaintiff's claim is for a declaration that the Loan Agreement, Debenture, Deed of Assignment (TE Proceeds) and Deed of Assignment (STMB Proceeds) executed between the 1st defendant and the 4th defendant are *void* for illegality and that the 1st, 2nd, and 3rd defendants, by way of restitution, pay a sum of RM1.5 million to the 4th defendant. Alternatively, the plaintiff's state that the 1st, 2nd, and 3rd defendants are constructive trustees to the 4th defendant for the sum of RM1.5 million and they are to return the said sum to the plaintiffs to be refunded forthwith to the 4th defendant. The plaintiffs have also claimed damages to be assessed by the court.

[3] Malaysian Industrial Development Finance Berhad, the 4th defendant, has denied the plaintiff's claim that it had assisted or conspired with the 1st, 2nd, and 3rd defendants in a scheme to defraud the plaintiffs. Instead it contends that the 1st defendant is the borrower of a loan facility of RM1,500,000 granted under the Fund for Small and Medium Industries 2 ("FSMI 2") and that the 2nd and 3rd plaintiffs are the guarantors. It has counterclaimed for a sum of RM1,522,949.17 as at 2 July 2007 together with interest at the rate of 6% per annum based on monthly rests until full settlement.

[4] The 4th defendant's counterclaim is denied by the plaintiffs on the basis, *inter alia*, that the 1st plaintiff had not received any of the goods ordered and thus there was a total failure of consideration.

The Plaintiff's Case

[5] The plaintiffs called a total of five witnesses in support of their case. Sanjay Neil a/l Ramasamy ("the 3rd plaintiff") is a director of the 1st plaintiff together with Andrew Charles Warren, the 2nd plaintiff. The 1st plaintiff is an events organiser with contracts with Televisyen Malaysia Berhad (TV3), Metropolitan TV Sdn Bhd and Tiga Events Sdn Bhd.

[6] In November 2005, Hishamuddin bin Malek (the 3rd defendant) from Victom Sdn Bhd had entered into an agreement with the 1st plaintiff to purchase a lighting system costing more than RM600,000, which system was then rented out to the plaintiffs. The plaintiffs had entered into the said agreement because they were unable to secure financing to purchase the Meyer Sound speakers which they needed for the expansion of the 1st plaintiff's business.

[7] The 3rd plaintiff testified as to how he had known the 3rd defendant. He first met the 2nd and 3rd defendants in 2002 when they were working in an events organising company whilst he was in a production company called Total Concept Project Sdn Bhd. The 2nd and 3rd defendants had sought their assistance for sound and lighting equipment for an event at the Shah Alam Stadium. Thereafter, he had met the 3rd defendant on a casual basis until September 2004 when he turned up at the 1st plaintiff's store where he had offered to procure for them a loan to purchase lighting equipment. And two months later the loan was approved.

[8] According to the 3rd plaintiff, the 1st defendant, Equipro Sdn Bhd, was set up on 2 September 2005. The 2nd defendant is a director of the 1st defendant and a brother-in-law of the 3rd defendant. The 3rd defendant is also a shadow director of the 1st defendant. It is the evidence of the 3rd plaintiff that the 1st defendant is but "a shell of a company" with no business activities and, in the scheme devised by the 3rd defendant, it was to be the purported supplier of the equipment to the 1st plaintiff.

[9] Sometime in November/December 2005, the 3rd defendant had approached the plaintiffs with a proposal to secure a loan from the 4th defendant for the 1st plaintiff to purchase sound and lighting equipment as the 1st plaintiff was facing some difficulty in securing a loan from a banking institution. Under the scheme devised by the 3rd defendant, the 1st plaintiff was to be the borrower of RM1.5 million from the 4th defendant, and the loan sum would be released to the 1st defendant who would utilise the loan sum for the purchase of the equipment. The 2nd and 3rd plaintiffs would be the personal guarantors for the loan. At that time, the 3rd plaintiff did not know that the 3rd defendant was fabricating this scheme.

[10] The 3rd plaintiff testified that on 7 June 2006, he and the 2nd plaintiff had a second meeting with the 4th defendant's officers at the 10th floor of the MIDF building to discuss the proposed loan. The purpose of the meeting was to introduce the 1st defendant and to discuss the equipment list. The 3rd defendant was present at the meeting. Also present were Encik Nazerin Omar and Encik Mohd Rizal, officers of the 4th defendant. As such, it is the evidence of the 3rd plaintiff that these officers of the 4th defendant had colluded with the 3rd defendant as regards the scheme, or they were fully aware of the scheme and had given their tacit approval to the scheme.

[11] The 3rd plaintiff denied that there was no collusion by the 4th defendant's officers. This was because at the meeting on 7 June 2006, the 4th defendant's officers, Mohd Rizal and Nazerin Omar, had told the plaintiffs "not to worry about the loan and they will look after everything". They had said that they would fabricate the pictures, the delivery orders, and the receipts to enable the monies to be released to the 1st defendant. The 1st defendant will then purchase the equipment and deliver it to the 1st plaintiff.

[12] The 3rd plaintiff denied any arrangement with the 3rd defendant. He claimed that the 3rd defendant was merely assisting them to get a loan and that he was doing it for free. He claimed to be unsure as to what the 3rd defendant would get out of helping the plaintiffs. He denied that he was lying when he claimed that there was no agreement.

[13] In furtherance of the scheme, the quotations for the equipment were fabricated by the 3rd defendant and sent to the 4th defendant. The 3rd defendant had even gone to see the owner of TV3 (the 1st plaintiff's client) to secure an assignment of proceeds on the 1st plaintiff's contract with TV3 in favour of the 4th defendant. This was admittedly done with the permission of the plaintiffs. The plaintiffs were persuaded to execute all necessary documents including a delivery order to secure the release of the loan sum of RM1.5 million from the 4th defendant to the 1st defendant even though there was no actual delivery of equipment. Reference was made to the delivery order at pp. 226-227 where at p. 227, the 2nd plaintiff had signed to acknowledge that the goods were received in good order and condition.

[14] In early 2006, the plaintiffs met with the officers of the 4th defendant and their solicitors at the 4th defendant's office and were told that the loan was approved and their paid up capital had to be increased. The 1st plaintiff did increase its paid up capital from RM200,000 to RM500,000 for the purpose of the loan. On 2 August 2006, the documentations for the loan were executed and on 29 August 2006 the loan sum of RM1.5 million was disbursed to the 1st defendant, as the purported supplier of the equipment to the 1st plaintiff. The 2nd plaintiff had signed an authorization letter dated 18 August 2006 to authorise the 4th defendant to disburse the loan to the 1st defendant (see p. 228).

[15] In court, the 3rd plaintiff had explained that the plaintiffs had agreed to the scheme proposed by the 3rd defendant because they were having difficulty in securing financing on their own. The 3rd defendant had represented that they would be able to secure financing through this mechanism devised by him whereby the 1st defendant would purport to be the supplier of the equipment. Upon the release of the loan sum to the 1st defendant, the 1st defendant would then have the financial resources to purchase the equipment needed by the 1st plaintiff. During cross-examination, he agreed that it was the 3rd defendant who had planned the scheme and that the plaintiffs were aware of this scheme. He further agreed that it was the 3rd defendant who had cheated the plaintiffs. The 3rd defendant had promised that once he had received the RM1.5 million, he would purchase the equipment and deliver it to the plaintiffs. However, this was not done after the money was received. The 3rd plaintiff agreed that this had nothing to do with the 4th defendant.

[16] No equipment was ever supplied by the 1st defendant. According to the 3rd plaintiff, the list of equipment and photographs of equipment allegedly supplied as well as the invoices were all fictitious. The equipment were either equipment already owned by the 1st plaintiff or the equipment of the 1st defendant's business associate, Bright Sound System, or the equipment of Fleet Solutions owned by Oh Chee Kok, the manager of the 1st defendant, or else they were merely photographs of equipment taken in China. In answer 18 of his witness statement, the 3rd plaintiff testified at length and in depth as regards to what was really in the list of audio and lighting

A equipment. Meanwhile, the photographs of the equipment were taken by the 3rd defendant and one Encik Mohd Rizal from the 4th defendant. The 3rd defendant acted in collusion with Mohd Rizal in taking photographs of the 1st plaintiff's old equipment and passing them off as new equipment. They also
B affixed stickers of the 4th defendant on some of the existing equipment of the 1st plaintiff to be passed off as the equipment that was supplied.

[17] According to the 3rd plaintiff, there was no inspection of the
C equipment by Encik Shahruazan bin Salleh from the insurers on 16 August 2006 as there was no equipment to be inspected. In fact, on the date of the alleged inspection, the plaintiff's own equipment were being utilized at a concert by the rock band INXS at Stadium Negara. Neither was there any inspection
D carried out by Encik Nazerin Omar of the 4th defendant on 17 August 2006. With reference to a General Insurance Cover Note issued by Allianz General Insurance Malaysia Berhad for RM3,369,960 worth of machinery, it is worth noting that the premium for the said insurance is RM42,471.50 which corresponds
E quite closely to the sum of RM42,472 sought to be deducted as "MIDF Insurance For EHQ" in the proposed settlement of the 3rd defendant.

[18] On 16 August 2006, Oh Chee Kok had brought the delivery
F order to the 2nd plaintiff for his signature so that the loan sum could be released to the 1st defendant as the supplier of the equipment. There was no evidence as to where the equipment was purchased from or any shipping documents to evidence that the equipments were shipped. In fact, it was pointed out that the
G 1st defendant was not even a distributor of Meyer Sound Equipment in Malaysia. In any event, no equipment was ever delivered to the 1st plaintiff because no equipment was procured by the 1st defendant.

[19] The 3rd plaintiff has alleged that the 1st defendant is the
H *alter ego* of the 3rd defendant and offered his reasons for saying so. On 15 October 2006 when attempts were made to locate the 3rd defendant, he had received an SMS message from the 2nd defendant which reads as follows:

I

> Bro, I know u set me up at Vistana. But its ok because I got nothing to do with dis matter. Though am a director of Equipro, its jes a name, sleeping director. I pun tengah cari Din because he's been using me. He's d bos of Equipro. Cheque solely signs by him. I've got nothing. So pls don't drag me into this.

[20] The 3rd plaintiff testified that after the loan was disbursed, he had met the 4th defendant's officers at the PWTC in mid September where the plaintiffs were then preparing for the finals of the "One in a Million". Rizal had come with Nazerin. The 3rd plaintiff was with the 2nd plaintiff. Rizal had called the 3rd plaintiff to the side saying that he was in touch with the 3rd defendant and to give him some time to resolve the purchasing of the equipment.

[21] The 3rd plaintiff referred the court to a letter bearing the 1st defendant's letterhead wherein the 1st defendant had acknowledged receipt of a sum of RM560,400 *vide* three cheques of RM110,000, RM150,000 and RM300,400 being the down payment of 27.2% of the full purchase price for the audio and lighting system purchased by the 1st plaintiff. According to him, all the cheques were fabricated and the 1st plaintiff had not paid anything. According to the 3rd plaintiff, this letter was willfully suppressed by the 2nd defendant.

[22] Since mid September 2006, the defendants had been avoiding the plaintiffs. Since the defendants had failed to utilize the RM1.5 million to purchase equipment for the 1st plaintiff, attempts were made to recover the monies so that the plaintiffs could purchase the equipment themselves. On 11 September 2006, Mohd Rizal who had resigned from the 4th defendant brought an offer of RM529,583 as settlement from the 3rd defendant. The offer was made on Vitcom's letterhead (p. 225) and sets out the amounts which were to be deducted from the RM1.5 million. According to the 3rd plaintiff, this statement of account was fabricated by the 3rd defendant. The offer was summarily rejected by the plaintiffs.

[23] The 3rd plaintiff testified that they had known the 3rd defendant first and that it was the 3rd defendant who had introduced them to the 4th defendant. The plaintiffs had agreed to purchase equipment from the 1st defendant and the loan obtained from the 4th defendant was for the purpose of purchasing the equipment. They had intended to purchase the

A equipment from various suppliers but had agreed for the loan to be disbursed to the 1st defendant because they were advised that they could not buy the equipment directly from these suppliers as most of them were based overseas and the 4th defendant wanted a third party to purchase the equipment and then supply them to B the 1st plaintiff. He admitted that he knew that the 1st defendant was not a dealer or a distributor of the equipment that he wanted but had still allowed the loan to be disbursed to the 1st defendant. He agreed that it was the responsibility of the 1st defendant and not the 4th defendant to deliver the goods to C the plaintiff. He took the stand that it is the 1st defendant's fault that the equipment was not delivered to the 1st plaintiff.

[24] The 3rd defendant has since absconded and attempts to locate him to secure a refund of the monies met with no success. D In light of the breach committed by the 1st defendant, the plaintiffs contend that the 1st, 2nd and 3rd defendants ought to be compelled to return the RM1.5 million so that the same can then be refunded to the 4th defendant. As such, the plaintiffs sought a declaration that the agreement executed between the E 1st defendant and the 4th defendant is *void* for illegality and that the 1st, 2nd, and 3rd defendants by way of restitution pay the sum of RM1.5 million to the 4th defendant.

[25] During re-examination, the 3rd plaintiff testified that when he F signed the documents, he was "in a way trying to defraud the bank". However, this was a scheme which was planned by the 3rd defendant and the two officers of the 4th defendant. If he did not sign, he would not see the monies and the equipment. If the equipment had been purchased, the plaintiffs would definitely have complied with the loan agreement. G

[26] Andrew Charles Warren, the 2nd plaintiff and a director of the 1st plaintiff together with the 3rd plaintiff, had adopted the whole of the testimony of the 3rd plaintiff. He admitted that he was a guarantor for the loan and he did not dispute his signature H on any of the documents.

[27] Norhisam bin Daud (PW3) is a technical manager in the 1st plaintiff's store who had been working with the plaintiff for the last ten years. With reference to the photographs of the I equipment at pp. 206 to 208, PW3 testified that the equipment belonged to the plaintiff and were kept at the plaintiff's store in

Bandar Sri Damansara. He told the court that Rizal, an officer of the 4th defendant and 'Din' had gone to the plaintiff's store, affixed stickers on the plaintiff's equipment and taken photographs of the equipment. Rizal took the photographs whilst Din followed Rizal and told him which equipment to photograph.

[28] PW3 denied that Nazerin bin Omar was one of the persons who had gone to the store on the day in question. However, he was unable to say whether others had come to the store after the incident to take photographs. Whilst he agreed that he need not necessarily have worked every single day, however he maintained that he would normally work every day and that no others had come to the store to take photographs whilst he was at work.

[29] M Vadivelu a/l A Mukiah (PW4) is a director of Spectrum Sound and Lights Sdn Bhd, the sole distributor of Nexo Speakers, Avolite, WholeHogs, Studio Due Lightings and most of the China products. He was referred to the list of products at p. 92 and he confirmed that neither the plaintiffs nor the defendants had purchased the list of products. He was also referred to p. 218 and he denied supplying the particular equipment to either the plaintiffs or the defendants. He further confirmed that the model in the picture was not a product of Whole Hog IPC. He identified the picture appearing at p. 218A as a lighting controller which is solely distributed by his company.

[30] The last witness for the plaintiff is Muraly Archunan (PW5). He is the director of Benchmark Associates Sdn Bhd, the sole distributor of Alcons Audio, Lap Gruppen, Digico and TC Electronics since 2000. The products distributed by him are expensive products and come with individual serial numbers either on the right side of the console or on the rear. He emphasised that there were no products without serial numbers.

[31] PW5 confirmed that neither the plaintiffs nor the defendants had purchased the list of equipment appearing at p. 91 of the common bundle. He was referred to the picture of a Digico D5 Digital Mixing Desk at p. 211 and he denied ever supplying the equipment to either the plaintiffs or the defendants. In fact, he testified that the model shown in the picture was NOT even a Digico D5 Digital Mixing Desk. What an actual Digico D5 Digital Mixing Desk would look like is shown in p. 211A.

A **The 4th Defendant's Case**

[32] The defendant called a total of three witnesses. Fazliana Zainal Abidin (DW1) had been an Assistant Manager in the Documentation Division of the 4th defendant since 15 March
B 2010. She identified the letter of offer from the 4th defendant to the 1st plaintiff for a loan of RM1.5 million under the Scheme FSMKI 2. The interest is 5.0% per annum with repayment of RM31,077.45 per month for 53 months and RM31,077.68 for the last month. Additional securities (after amendment) required for the
C loan were:

(i) A first fixed charge on the machinery/equipment to be financed as per the list in annex I;

(ii) A first fixed charge on existing machinery/equipment as per the
D list in annex II;

(iii) The joint and several guarantees of Andrew Charles Warren and Sanjay Neil a/l Ramasamy in their personal capacities for the repayment of the loan and interest thereon;

E

(iv) A Deed of Assignment of the proceeds of the contract between the 1st plaintiff and Media Prima Berhad (MPB) and its group of companies ie, Sistem Televisyen Malaysia Berhad (STMB), Metropolitan TV Sdn Bhd (MTSB) and Tiga Events Sdn Bhd (TESB);
F

(v) Irrevocable letter of instruction from the 1st plaintiff to MPB, STMB, MTSB and TESB to pay all contract proceeds to the 4th defendant, which letter shall not be varied or amended without the 4th defendant's written consent; and

G

(vi) A letter of undertaking from MPB, STMB, MTSB and TESB agreeing to carry out the letter of instruction from the 1st plaintiff.

H **[33]** The 1st plaintiff had requested for a change of the terms of offer by deleting MPB as one of the securities. The change was agreed to by the 4th defendant but with the inclusion of two additional conditions, namely:

I

(i) Establishing an escrow account where the 4th defendant is to be one of the co signatories for every transaction throughout the loan tenure; and

(ii) Maintaining a minimum amount of one monthly installment of principle and interest of RM31,077.45 in the escrow account throughout the loan tenure.

[34] DW1 identified the loan agreement entered into between the 4th defendant and the 1st plaintiff (pp. 1-55). It is noted that under s. 4.02 on Disbursement of the Loan, it is provided that the loan would be disbursed in the manner as set out in the second schedule. And the second schedule provides that after the 1st plaintiff has presented to the 4th defendant with invoices and other documentary evidence, satisfactory to the 4th defendant, to show the purchase, arrival and delivery of the new machinery as well as receipts showing the payments made, disbursement shall be made on the basis of 72.80% of the costs of the new machinery.

[35] *Vide* a debenture dated 2 August 2006 (pp. 56-95), the 1st plaintiff had charged to the 4th defendant as security both the machinery/equipment financed by the 4th defendant as in annex I as well as the existing machinery/equipment as in annex II. The 2nd and 3rd plaintiffs had also signed a guarantee agreement (pp. 136-162) to guarantee the repayment of the loan to the 1st defendant. Section 3.01 of the Loan Agreement provides that the guarantors absolutely, irrevocably and unconditionally guarantee jointly and severally as principal debtors and not merely as sureties the repayment by the borrower of the secured amounts. Under s. 3.02, if the 1st plaintiff fails to observe or comply with any of the terms of the security documents, the 4th defendant would be entitled to demand the repayment in full of the outstanding amounts from the guarantors.

[36] According to DW1, all the documents signed by the parties were legal and in accordance with procedure and would bind the plaintiffs with the 4th defendant.

[37] The defendant's 2nd witness is Nazerin Omar (DW2). He is an accounts manager with the 4th defendant since 2007, having been in employment with the 4th defendant for some 18 years. He testified that he had knowledge about the case as he was the representative of the 4th defendant who was dealing with the plaintiffs.

[38] According to DW2, the 1st plaintiff had on 31 March 2006 applied to the 4th defendant for a loan facility of RM4 million to purchase equipment. However, only a loan of RM1.5 million was approved.

[39] DW2's evidence as regards the letter of offer, the signing of the letter of offer, amendments to the terms and conditions as well as the additional security in relation to the loan facility would mirror that of DW1 and would thus not be recounted again. Suffice to say that after the parties had signed the loan agreement, the 1st plaintiff had also signed the debenture and the 2nd and 3rd plaintiffs had signed the guarantee agreement to guarantee the loan to the 1st plaintiff.

[40] Reference was made to the Deed of Assignment of the proceeds of the contract between the 1st plaintiff and STMB as well as to the letter of undertaking from STMB, MTSB and TESB agreeing to carry out the letter of instruction of the 1st plaintiff in respect of the assignment of proceeds.

[41] According to DW2, the full amount of the loan facility had been disbursed for the benefit and interest of the 1st plaintiff after all the terms and conditions required for the disbursement had been complied with. The 1st plaintiff was required to produce all relevant documents relating to the purchase and delivery of the equipment to be financed. This was done by:

(i) Evidence of the insurance cover note from Allianz General Insurance Malaysia Berhad (pp. 192-193) to show that the goods financed by the 4th defendant had been insured after delivery. The value of the goods insured tallies with the list of machineries/equipment to be financed as set out in pp. 129-131;

(ii) Delivery order evidencing that the equipment had been supplied (pp. 226-227). The 1st plaintiff, through its director, the 2nd plaintiff had confirmed receipt of the equipment in good order and condition;

(iii) Invoice from the 1st defendant to the 1st plaintiff (pp. 108-108A); and

(iv) Receipt of payment (pp. 223-224).

[42] After the above documents had been received, an inspection would then have to be carried out. According to DW2 he had carried out the inspection himself accompanied by Encik Mohd Rizal Md Hakim, a former employee of the 4th defendant. The normal procedure for carrying out an inspection is that he will make a call to the 1st plaintiff to fix a date and time for the inspection. And during the inspection, they would identify the equipment which had been financed.

[43] In this case, the inspections was carried out on 17 August 2006 at two locations – at a shop lot at 23-1-2, Jalan Meranti 13/4, Bandar Sri Damansara as well as at Stadium Negara as some of the machinery were then being used for an event which the 1st plaintiff was handling at Stadium Negara. During the inspection, the 2nd and 3rd plaintiffs assisted by identifying the equipment according to the list in the letter of offer. DW2 had subsequently prepared a report on 21 August 2006 (pp. 204-204B. Photographs of the equipment appear at pp. 205-222.

[44] DW2 explained that, following procedure, the 4th defendant had then disbursed the loan, not to the 1st plaintiff but to the supplier of the machinery to settle the balance of the purchase price of the equipment financed. This was done after receipt of the letter of authorization from the 1st plaintiff (P2). It is the procedure of the 4th defendant to require a letter of authorization where monies are to be disbursed to the supplier of goods. In this case, since all documentation was in order, the 4th defendant had duly disbursed the loan amount to the 1st defendant as the supplier of the goods.

[45] After the disbursement of the loan amount to the 1st defendant, the 1st plaintiff had made one repayment, but only towards interest. It had not made any complaints to the 4th defendant. DW2 stressed that if the 1st plaintiff had not received the goods, then it should not have signed the delivery order or given the letter of authorisation to disburse the loan proceeds to the 1st defendant. Instead, the 1st plaintiff should have made a complaint to the 4th defendant before the loan proceeds were disbursed.

[46] What transpired next was that the plaintiffs had obtained various injunctive orders against the 1st plaintiff to free its bank account? Thereafter, the plaintiffs had stopped payments of their

A installments. The 4th defendant had then counterclaimed against the plaintiffs for a sum of RM1,522,949.17 as at 2 August 2007 plus interest. DW2 pointed out that the plaintiffs had initially pleaded that the monies that had been received by the 1st defendant be refunded to the 4th defendant because the
B 1st defendant had failed to supply the equipments that were financed. However, after the plaintiffs had amended their statement of claim, they had alleged that the 4th defendant had colluded with the 1st, 2nd, and 3rd defendants in a scheme devised by the 1st, 2nd, and 3rd defendants to commit fraud
C against the plaintiffs.

[47] DW2 had strenuously denied the plaintiff's allegations of fraud. He denied any knowledge of the conspiracy allegation or even of any assistance to the 1st, 2nd, and 3rd defendants to
D commit fraud against the plaintiffs. He pointed out that it did not make sense for a financial institution like the 4th defendant to commit fraud or to conspire against the plaintiffs as the loan facility had already been given to them in accordance with the terms and obligations under the Loan Agreement and the
E Debenture. And all the documents and evidence adduced would show that all the conditions for disbursing the loan had been complied with.

[48] DW2 admitted that a meeting did take place between the
F officers of the 4th defendant together with the 3rd defendant and the 2nd and 3rd plaintiffs at the officers of the 4th defendant before the loan offer was issued. He explained that this was a normal procedure in the 4th defendant to have an introductory meeting with the customers to discuss their needs and the loan
G application and for the 4th defendant to obtain additional information to assess the application. Whilst the 3rd defendant had previously taken a loan from the 4th defendant, the plaintiffs had no prior transactions with the 4th defendant.

[49] According to DW2, the 1st defendant is the supplier of the
H equipments which were purchased by the plaintiffs. Reference was made to the SSM documents of the 1st defendant and in particular to p. 106 which reveals that there was no information as to the company's profit and loss account. DW2 claimed to be aware that the 1st defendant had no funds of its own. He claimed
I to be aware of due diligence and claimed to have done cross

checking on whether the 1st defendant was an appointed agent of the equipment to be supplied. According to him he had found out that the 1st defendant was an appointed agent. He was referred to a list of dealers, distributors and rental companies of the equipment to be supplied which did not include the 1st defendant. Nevertheless he maintained that the 1st defendant was an authorized agent although no documentation or other proof was produced before the court to back his claim.

[50] During cross-examination, DW2 was also referred to the list of equipment to be purchased (pp. 129-130). He claimed to be aware of this document. He denied that he did not ask the 1st defendant where it was going to source the equipment from and whether it had the funds to do so and denied that he did nothing on due diligence. However, when queried as to the documents which would show that the supplier had received the equipment from the suppliers, he admitted that there were no such documents. It is his evidence that the bank would be satisfied that the equipment was received from the invoice and delivery order. When queried as regards the "arrival" of the equipment, he offered the explanation that "delivery" and "arrival" means the same thing and that "arrival" of the goods means the delivery of the goods at the plaintiff's premises.

[51] The court notes that the witness was cross-examined at length on the inspection at the plaintiff's premises. When learned counsel for the plaintiffs asked DW2 whether he had met anybody down stairs when he went upstairs to take the photographs, he answered in the negative. DW2 also testified that it was the 2nd and 3rd plaintiffs who took him upstairs. The court was informed by counsel that he had just caught the witness lying as the equipments were never kept upstairs and the witness had never gone to the premises. During re-examination, the witness attempted to back track and testified that there were some workers as well as the 2nd and 3rd plaintiffs at the premises and that the pictures were taken at the ground floor. When queried as to why he had earlier testified that he had gone upstairs to take the photographs, he gave the following answer:

> It was my wrong answer.

[52] Further questions were posed as regards the equipments. These were new and expensive equipments costing more than RM1.5 million. DW2 was referred to the inspection report at pp. 204-222. He agreed that in his inspection report there was no serial numbers, model numbers and chassis numbers for the equipments. He claimed that there were no serial numbers on the equipments. When asked whether the 4th defendant was going to repossess the equipments, DW2 did not answer the question. When further pressed on this point, he told that court that he could not answer the question as the matter would be handled by another department.

[53] Questions were posed about the 1st defendant. DW2 was not aware as to who were the cheque signatories of the 1st defendant. He was also not aware as to who was the managing director of the 1st defendant. When queried as to how he could make payment of RM1.5 million to the 1st defendant in the circumstances, he offered the following answer:

> Based on the authorization letter of the 1st defendant. It does not matter if it is a RM2 company. If I am authorized, I would pay.

The court found this answer incomprehensible in light of his admission that it is part of his due diligence to know something about the supplier.

[54] DW2 had also denied the plaintiff's allegation that the officers of the 4th defendant had conspired with the 3rd defendant to concoct the fake photographs of the equipment. He disputed the plaintiff's allegation that he had signed an inspection form to certify inspection of the equipment when no equipment had been supplied to the plaintiffs and claimed that an investigation had indeed been carried out.

[55] As regards the plaintiff's claim that DW2 had brought a letter of offer of settlement on Vitcon's letterhead to the 2nd defendant on behalf of the 3rd defendant proposing a settlement figure of RM560,400, DW2 categorically denied the allegation and stated that he and the 4th defendant had no knowledge of this letter.

[56] It is DW2's evidence that the plaintiff's allegations were all untrue, without basis and raised for the purpose of avoiding having to pay the outstanding sums under the Loan Agreement and the Guarantee Agreement.

[57] The 4th defendant has also called Mohd Rizal bin Md Hakim (DW3) as a witness in support of it case. DW3 was a former employee of the 4th defendant who was responsible for processing loans. He commenced employment with the 4th defendant in 2002 and had ceased employment around August 2006.

[58] According to DW3, the 1st plaintiff is a customer of Vitcom Sdn Bhd, who in turn was a borrower of the 4th defendant and under his care. Vitcom had once obtained a loan of RM1.2 million from the 4th defendant and the goods financed were placed in the warehouse of the 1st plaintiff where he had gone to make an inspection.

[59] DW3 admitted knowing the 3rd defendant. According to him, the 3rd defendant's company had taken a loan from the 4th defendant. When he was still with the 4th defendant, the 3rd defendant's company had made installment repayments. He disagreed that the 3rd defendant's company had not made any repayments at all. However, he admitted that he had no knowledge if the 3rd defendant's company had been wound up and the 3rd defendant made a bankrupt. He claimed to have no dealings with the 3rd defendant after he had left the 4th defendant's employment.

[60] The 1st plaintiff had subsequently attended at the 4th defendant's office to submit a loan application and DW3 was the attending officer. The initial application was made through DW3 where the 1st plaintiff had handed over all the necessary documents, and explained about its business and the need for the loan facility. As DW3 had intended to leave the employment of the 4th defendant, he had handed over the 1st plaintiff's loan application to Encik Nazerin Omar (DW2), a manager of the 4th defendant. He claimed that thereafter he was no longer involved with the transaction between the 1st plaintiff and the 4th defendant.

[61] As to how he became involved with the inspection of the equipment, DW3 testified that he had received a telephone call from DW2 for assistance to show the way to the 1st plaintiff's store and he had agreed to render assistance. There were two locations for inspection – at the 1st plaintiff's store at Bandar Sri Damansara and at Stadium Negara. Apart from DW3 and DW2, the 2nd and 3rd plaintiffs were also present at the inspection.

[62] DW3 testified that on arrival at the store, he saw DW2 begin his inspection by identifying and affixing stickers on the equipments that were financed by the 4th defendant and taking photographs of the equipments. He explained that the purpose of the stickers was to identify the equipments that were financed. As DW2 and DW3 were not technical people, he claimed that it was the 2nd and 3rd plaintiffs who had shown them which equipments to affix stickers. At first DW2 had taken photographs whilst DW3 affixed stickers. However, since there were a lot of equipments, DW3 had taken photographs as well. He identified the photographs at pp. 205-222 as some of the photographs that were taken by him. However, he could not identify which were the photographs that he took and which were taken by Nazerin. He told the court that he was present beside DW2 throughout the entire inspection. He denied that DW2 was not present and that he was the only one present who had taken photographs.

[63] DW3 admitted that he was aware of the importance of serial numbers on the equipments. He agreed that the details as to the description of the equipment, the serial number, model etc would be a way of identifying a particular equipment. He admitted that before this incident, he had taken photographs of machinery/ equipments and there were serial numbers on the machinery/ equipments. In this case, he had endeavored to find the serial numbers but was unable to locate them. The model numbers were available and he did not know why DW2 had not stated the model numbers at pp. 204A and B.

[64] After leaving the first location, they had gone to Stadium Negara as some of the equipments financed by the 4th defendant were in use at the stadium for a project. At the stadium, DW3 assisted DW2 in identifying the equipments, affixing stickers, and taking photographs of the equipments.

[65] During cross-examination, DW3 testified that he had left the 4th defendant's employment because he had wanted to start his own business. He had commenced a photostatting business and had also owned a construction business. He denied that he had obtained financial assistance from the 3rd defendant such that he could stop employment with the 4th defendant and start his own business. He further denied that the 3rd defendant is his partner in his present business. He did not receive any payment from the 4th defendant for going with DW2 for the inspection. He denied

that he had gone for the inspection with DW2 because he, DW2 and the 3rd defendant had conspired to devise a scheme to release the loan of RM1.5 million to the 1st defendant.

[66] DW3 denied that he had met the 2nd and 3rd plaintiffs in the "one in a million" finals at PWTC and informed them that the 3rd defendant had absconded with the RM1.5 million and that he would endeavor to get back the money. He denied asking for a bit of time to resolve the matter about the purchase of the equipments. He denied that he had started his business with part of the RM1.5 million. He claimed that even before he left the 4th defendant, he already had two photostatting shops and a construction business.

Evaluation Of The Evidence And Findings

[67] In coming to a decision in this case, the court has carefully perused the evidence adduced by the parties and examined the documentary evidence relied on by them in support of their cases.

[68] In order to determine the respective claim and counterclaim of the plaintiffs and the 4th defendant respectively, it is essential that the court first determines the events that had occurred which gave rise to the present suit. The court is confident that with a proper finding as to the events that had occurred, the respective claims of the disputants would become clear and simple to resolve.

[69] The plaintiff's case can be divided into two segments:

(i) The background facts and the initial agreement between the plaintiffs and the 1st, 2nd and 3rd defendants; and

(ii) The subsequent tableau of events incorporating the participation of the officers of the 4th defendant.

The court will deal with each of the two segments in turn.

[70] As regards the background facts and the initial agreement between the plaintiffs and the 1st, 2nd and 3rd defendants, the court finds that this evidence is largely undisputed as it is only the 2nd and 3rd plaintiffs who have adduced evidence before the court in this respect. The evidence of the 4th defendant's witnesses in this regard would only corroborate the plaintiff's account of the background facts.

[71] The court accepts that the plaintiffs had a need for financing in order to purchase sound and lighting equipment for their business. Based on their own evidence, the court finds that the plaintiffs were unsuccessful in their efforts to secure financing.

[72] The 3rd plaintiff was acquainted with the 3rd defendant as the 3rd defendant's company, Vitcom Sdn Bhd, had once obtained a loan from the 4th defendant to purchase lighting equipment worth over RM600,000 which was then rented out to the 1st plaintiff. The court accepts the evidence of the 2nd and 3rd plaintiffs that when the plaintiffs were unsuccessful in securing a loan, they were approached by the 3rd defendant with an offer to procure a loan for the 1st plaintiff to purchase the sound and lighting equipment.

[73] The court accepts the evidence of a meeting held on 7 June 2006 between the 2nd and 3rd plaintiffs who were representing the 1st plaintiff with the 4th defendant's officers, Encik Nazerin Omar and Encik Mohd Rizal, at the 4th defendant's premises. Encik Nazerin Omar (DW2) does not dispute that there was such a meeting on the said date or that the 3rd defendant was present. The court recalls his evidence that such a meeting was a normal procedure to meet the customer who was applying for a facility, to know the customer's needs and to obtain information in order to assess the application. The reason for the presence of the 3rd defendant can be explained by the evidence of DW2 to the effect that whilst the 3rd defendant had previously taken a loan from the 4th defendant, the plaintiffs had no prior transactions with the 4th defendant.

[74] It is the court's finding that the presence of the 3rd defendant at the first meeting between the 2nd and 3rd plaintiffs and the officers of the 4th defendant is consistent with the plaintiff's claim that it was the 3rd defendant who had offered to secure the loan facility for them.

[75] It is the plaintiff's contention that in respect of "the scheme" devised by the 3rd defendant, the 1st plaintiff would be the borrower of RM1.5 million from the 4th defendant, the loan sum would be released to the 1st defendant who would then utilise the loan sum for the purchase of the equipment. The 2nd and 3rd plaintiffs would be the personal guarantors for the loan. However, whether this arrangement should be called a

scheme is questionable. The court is of the view that this arrangement may more appropriately be called a mechanism for securing the loan. The court finds that the 3rd defendant would have been more knowledgeable about the ways and means of securing a loan facility for the purchase of equipments and that the 4th defendant would be willing to approve a loan for the purchase of equipments if the loan amount of up to a certain percentage of the value of the equipments is disbursed directly to the supplier of the goods. There would have been other conditions such as the 2nd and 3rd plaintiff's agreement to stand as guarantors, the securing of deeds of assignment assigning the proceeds of the 1st plaintiff's contracts with third parties in favour of the 4th defendant and a charge over the equipments financed.

[76] The court finds that the plaintiffs were well aware that it was part of the arrangement worked out by the 3rd defendant that the goods would only be supplied by the 1st defendant AFTER the disbursement of the loan to the 1st defendant. To this end, the 1st plaintiff would have to convince the 4th defendant that the goods had indeed been delivered and this was done by the 2nd plaintiff acknowledging that the goods had been indeed delivered in good condition.

[77] In para. 15 of the amended statement of claim, the plaintiffs had pleaded that "the 4th defendant facilitated and or colluded or conspired with the 1st, 2nd and 3rd defendants in the scheme devised by the defendants to defraud the plaintiffs of the sum of RM1.5 million". From the evidence adduced, can it be said that the plaintiffs were defrauded?

[78] What then is the definition of fraud? Reference has been made to s. 17 of the Contracts Act 1950 which defines "fraud" as follows:

> "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, **with intent to deceive another party** thereto or his agent, or to induce him to enter into the contract:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
>
> (b) the active concealment of a fact by one having knowledge of belief of the fact;

A (c) a promise made without any intention of performing it;

(d) any other act fitted to deceive; and

(e) any such act or omission as the law specially declares to be fraudulent.

B (emphasis added)

[79] The court has deliberated on the definition of 'fraud' and is of the view that, on the facts as adduced, where the plaintiffs were well aware of the arrangement or mechanism under which C the loan was to be obtained and the proceeds of the loan disbursed to the 1st defendant, the plaintiffs could not be said to have been defrauded as regards the alleged "scheme" or mechanism. The court is of the view that the plaintiffs were active parties to the arrangement and as such the issue of fraud being D committed against them by the 4th defendant would not arise.

[80] The court is in agreement with learned counsel for the 4th defendant that the burden of proving fraud is the beyond reasonable doubt test. Reference is made to the case of *Narayanan* E *Chettiyar v. Official Assignee, Ranggoon* [1941] PC 95 where Lord Atkin observed as follows:

> There are other difficulties in the plaintiff's way which have been sufficiently considered in the judgments of the High Court. Fraud F of this nature, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established **beyond reasonable doubt.** The High Court was justified in holding that the trial judge's finding was largely based on suspicion and conjecture. (emphasis added)

G **[81]** In the case of *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229, the Federal Court had held that the standard of proof for fraud in civil proceedings is proof beyond a reasonable doubt. The Federal Court had referred to an earlier Federal Court decision in the case of *Adorna Properties Sdn Bhd v. Boonsom* H *Boonyanit* [2001] 2 CLJ 133 which had held that the standard of proof required to prove forgery in civil cases is on a balance of probabilities. The Federal Court in *Yong Tim*, in considering the question of whether the standard of proof in civil cases for "forgery" as expressed in *Adorna*'s case should also be applied to

I

the case of "fraud" had held that the onus of proof is proof beyond reasonable doubt. His Lordship Steve Shim, CJ had answered the question at p. 235, para c line 3 as follows:

> In the circumstances, the Court of Appeal in the instant case is misconceived in holding that the proper test to establish fraud is on the balance of probabilities. In our view, the Court of Appeal has obviously misdirected itself in rejecting the proposition of law applied in *Saminathan v. Pappa (supra)* that the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt which has consistently been applied by courts in Malaysia. We see no reason to disturb that trend. That being the position, the answer to the first question postulated has to be in the negative.

[82] As such, since the plaintiffs have alleged that fraud had been committed against them, it is incumbent upon them to establish this beyond reasonable doubt. And this they have failed to do.

[83] The court has next considered the role and participation of the two officers of the 4th defendant. Nazerin Omar (DW2) is an accounts manager with the 4th defendant since 2007. Mohd Rizal bin Md Hakim (DW3) was a former employee of the 4th defendant who was responsible for processing loans. He commenced employment with the 4th defendant in 2002 and ceased employment around August 2006. From their employment history with the 4th defendant and their experience in processing loans for the customers of the 4th defendant, the court is satisfied that DW2 and DW3 would have been more than knowledgeable both about the requirements for the approval of loans as well as for their disbursement.

[84] The court has carefully weighed the evidence of the 3rd plaintiff about how the fictitious list of equipments and photographs was prepared. Based on the evidence of the 3rd plaintiff, the role of the 4th defendant's officers would have been significant. The role of the 3rd defendant and Mohd Rizal from the 4th defendant in taking photographs of the 1st plaintiff's old equipment and passing them off as new equipment as well as affixing stickers of the 4th defendant on some of the existing equipment of the 1st plaintiff to be passed off as the equipment that was supplied is very pertinent and speaks volumes of the involvement of the 4th defendant's officers.

[85] The court finds that the credibility of the 4th defendant's Nazerin bin Omar to be less than inspiring. The court is unable to comprehend how he could have done what he did in processing and approving the loan unless he was totally involved and committed to the arrangement or mechanism. The court notes the following glaring evidences of his and Mohd Rizal's involvement and complicity:

(i) The absence of an inspection of the equipments either by the insurers or by Nazerin Omar as there were no new equipments to be inspected;

(ii) The absence of serial numbers on the expensive equipments was unacceptable. The explanation of DW3 that he could not see the serial numbers on the equipments was both unacceptable and unbelievable. Apart from the evidence of PW5 that all products would come with serial numbers for identification purposes, the court finds that the 4th defendant's officers should have known that the serial numbers would be of paramount importance if there was a subsequent need to repossess the equipments;

(iii) There was no delivery of equipments to the 1st plaintiff or else the 4th defendant would have acted to recover the equipments upon the failure of the plaintiffs to service their loan repayments;

(iv) There was no evidence that the officers of the 4th defendant had carried out due diligence to ascertain who were the manufacturers who allegedly sold the goods and equipments to the 1st defendant. There was also no evidence that the officers of the 4th defendant had ascertained that the 1st defendant was indeed a dealer or a distributor of the Meyer sound equipment. The court is unable to accept DW2's bare assertion that he knew that the 1st defendant was an authorized dealer/distributor of the said equipment;

(v) There was no evidence that DW2 had satisfied himself through evidence of shipping documents that the goods ordered had indeed arrived; and

(vi) The loan was disbursed despite the fact that there was clear non compliance with s. 4.2 as well as the second schedule of the loan documentation in that it was highly doubtful whether

the officers of the 4th defendant would have sighted the invoices and other documentary evidence to evidence the purchase, arrival and delivery of the new equipments.

[86] The court is satisfied that the evidence adduced points irresistibly to the conclusion that the 4th defendant's officers were not only aware of the scheme, arrangement or mechanism for the disbursement of the loan to the 1st defendant without and before the actual purchase and delivery of the equipments by the 1st defendant to the 1st plaintiff but that they had taken an active part in bringing about the scheme, arrangement or mechanism into fruition.

[87] What then is the effect of the actions of the 4th defendant's officer's on the 4th defendant and consequently on its counterclaim? In the case of *Dato' Zamzuri Ghaffar v. BIMB Trust Ltd & Ors* [2010] 1 LNS 925, His Lordship David Wong Dak Wah J had occasion to deal with the issue of whether the 1st defendant was vicariously liable for the negligent acts of the 2nd and 3rd defendants. That issue was discussed in the High Court case of *Yeo Tin Sang v. Lim Choo Kee* [1960] 1 LNS 164 where Thomson CJ held as follows:

> For myself I will start my consideration of this appeal by quoting the following decision from an old edition of Bowstead on Agency [1944(10th edition) p. 206]:
>
> Where injury or loss is caused to a third person by the wrongful act of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent.
>
> I accept that as a correct statement of the law.

[88] Further, the Court of Appeal in the case of *Maslinda Ishak v. Mohd Tahir Osman & Ors* [2009] 6 CLJ 653, had quoted with approval the judgment in *Dyer v. Munday* where Lord Esher MR ruled as follows:

> The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.

[89] As such, based on the evidence adduced and the authorities as stated above, the court finds that the 4th defendant is liable for the actions of its officer/s.

Conclusion

[90] In conclusion, the court finds that the plaintiffs have failed to make out their case against the 4th defendant and as such the plaintiff's claim against the 4th defendant is dismissed. The court further finds that the 4th defendant has failed to make out its counterclaim against the plaintiffs on a balance of probabilities and as such, the 4th defendant's counterclaim is also dismissed. Since judgment in default had been entered against the 1st defendant, the court herewith orders that the sum of money from the 1st defendant's account which had been injuncted by the plaintiff be returned to the 4th defendant. Each party is to bear its own costs.